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Nos. 94-1893, 94-1900

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, *et al.*,

Petitioners,

v.

CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA, *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

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RESPONSE TO SUGGESTION OF MOOTNESS

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RESPONSE TO SUGGESTION OF MOOTNESS

The Telecommunications Act of 1996 does not moot this case.[1] Although the Act formally repeals 47 U.S.C. § 533(b), it substitutes new provisions that keep in place, for at least six months, the prohibition on a telephone company's provision of video programming to its local telephone subscribers over an "open video system" (the Act's new name for "video dialtone").

In this lawsuit, respondents have sought to speak over just such an open video system. *See* J.A. 13 (Complaint ¶ 28). As the Solicitor General has acknowledged, respondents' "principal objective" in this litigation was to establish their right "to develop a video dialtone system on their own telephone network for the transmission of their own programming." Govt. Br. 42. Because

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[1] Pursuant to Rule 29.6, respondents incorporate the statement of parent companies and nonwholly owned subsidiaries contained in the Response to the Petitions for Certiorari.

the new Act preserves § 533(b)'s ban on the precise form of video speech at issue in this case, the controversy before this Court remains very much alive. The Court should therefore reject the Solicitor General's suggestion of mootness and deny his request to dismiss this case.

1. Respondents challenged § 533(b) both on its face (J.A. 9-13) and as applied to their provision of video programming over a proposed video dialtone network in Alexandria, Virginia (J.A. 13-14). In the district court, the Government conceded that the facts surrounding the Alexandria video dialtone network "typifie[d]" the application of § 533(b) and that a facial challenge was therefore appropriate. Govt. Summary Judgment Br. 79 (May 22, 1993). The district court agreed and ultimately invalidated that law both on its face and as applied. *See* Pet. App. 108a n.36; *see also* Pet. App. 6a (opinion of the Court of Appeals).

While § 302(b)(1) of the 1996 Act formally repeals 47 U.S.C. § 533(b), § 302(a) of the Act qualifies that repeal by adding new language governing a telephone company's provision of video programming directly to subscribers.[2] First, the Act gives a telephone company limited authority to provide video programming over its own non-common carrier "cable system." *See* 47 U.S.C. § 651(a)(3)(A).[3] Although the facial relief granted below permitted respondents to provide video programming in that manner, the complaint in this lawsuit alleged no plan for doing so. Second, the Act allows a telephone company to provide video programming over an "open video system," but only "[t]o the extent permitted by such regulations as the [FCC] may prescribe

[2] *See* 47 U.S.C. §§ 651, 652, and 653 (added by the 1996 Act).

[3] The authority may be exercised in most cases only by building a new cable system, not by acquiring or managing an existing one. With several exceptions, the Act forbids a telephone company or its affiliates from acquiring "more than a 10 percent financial interest, or any management interest, in any cable operator providing cable service within the local exchange carrier's telephone service area." 47 U.S.C. § 652(a).

consistent with the public interest, convenience, and necessity." 47 U.S.C. § 653(a)(1).[4]

No such regulations exist today. The 1996 Act directs the FCC to promulgate regulations "[w]ithin 6 months after the date of enactment of the Telecommunications Act of 1996." 47 U.S.C. § 653(b)(1).[5] The absence of regulations in the interim translates into a continuation of the flat prohibition on speech: A telephone company is absolutely barred from providing video programming over an "open video system." Until the FCC adopts new rules to govern speech over such systems, and until those rules actually take effect, respondents may not provide their own programming over their own common carrier network directly to their telephone subscribers.[6]

The Act does allow telephone companies to provide video programming over a cable system — and to that extent may offer

[4] Although "open video system" is not defined, the term is meant to include at least the "video dialtone systems" for which the FCC previously proposed to grant waivers of § 533(b). *See* 47 U.S.C. § 653(a)(1) (added by the 1996 Act) (describing the nature of an "open video system"); *compare* Third Report and Order, *Telephone Company-Cable Television Cross-Ownership Rule, Sections 63.54-63.58*, 10 FCC Rcd 7887 (1995).

[5] Congress terminated the effectiveness of the FCC's video dialtone rules (§ 302(b)(3) of the 1996 Act) because they had "created substantial obstacles to the actual operation of open video systems" (S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 179 (1996)), and had "served as an obstacle to competitive entry" by telephone companies. *Id.* at 57. Congress left unaffected, pending the FCC's promulgation of new rules, the provision of programming over any video dialtone system previously approved by the FCC. § 302(b)(3) of the 1996 Act; *see* S. Conf. Rep. No. 230, at 179.

[6] Given the long history of regulatory delay in this area since 1987, *see* Resp. Br. 37-38, the ban on speech may well be retained for substantially longer even than the six months specified in the statute. The deadline is not self-enforcing: nothing in the statute authorizes telephone companies to provide video programming over open video systems if the FCC simply fails to adopt regulations within the six-month period. Nor can the deadline be enforced by mandamus, because under a statutory delegation like this one, a court "cannot order the promulgation of any particular regulation or set of regulations." *Plan for Arcadia, Inc. v. Anita Assocs.*, 501 F.2d 390, 392 (9th Cir. 1974), *cert. denied*, 419 U.S. 1034 (1975).

respondents an "alternative channel of communication."[7] But a limited opportunity to speak over a cable system does not moot a controversy concerning the continuing ban on speech over an open video system. A ban on the provision of video programming to subscribers, whatever its scope or duration, cannot survive even intermediate scrutiny (let alone strict scrutiny), because its focus on the editorial function as such assures that it cannot meet the requirement that it be narrowly tailored to an important governmental interest. *See* Resp. Br. 12-34.

Far from mooting the controversy, therefore, the 1996 Act *perpetuates* the controversy. It does no more than require the FCC, at some point in the future, to take regulatory action that might *then* moot this case. Until some such action is taken, however, this Court retains — and should exercise — its power to adjudicate the case on its merits.

2. This Court's precedents do not support the Solicitor General's suggestion of mootness. On the contrary, the Court has made clear that a case does not become moot when, as here, a challenged law is repealed after grant of certiorari and replaced with a different statute that disadvantages the plaintiffs "in the same fundamental way." *Northeastern Florida Chapter of Associated General Contractors v. City of Jacksonville*, 113 S. Ct. 2297, 2301 (1993).

Repeal of a challenged statute can moot a case, of course, if it brings the controversy truly to an end. Had Congress eliminated § 533(b) without retaining a ban on precisely the video speech described in the complaint — had it thereby left respondents free to do *now* exactly what they claimed in this action a First Amendment right to do — this case would be over. For example,

[7] Even the scope of this avenue is subject to doubt. The 1996 Act contains no language defining "open video systems." Such a definition would be necessary for a telephone company to know with certainty where not-yet-permitted "open video systems" end and now-theoretically-permitted cable systems begin. In the absence of such a definition, a telephone company must guess when and how, if at all, it might be allowed to use its own telephone network to provide video programming without complying with the FCC's yet-to-be-promulgated "open video system" regulations.

in *United States Dep't of Justice v. Provenzano*, 469 U.S. 14 (1984) (*per curiam*), where the Government as petitioner claimed that a Privacy Act exemption allowed it to withhold information sought under the Freedom of Information Act, the case was mooted by an amendment to the Privacy Act that resolved the issue squarely in respondents' favor.[8]

The 1996 Act has no such effect. By preserving for at least six months (and perhaps much longer) a ban on precisely the form of video programming that respondents seek to provide, the new statute prolongs, rather than terminates, the controversy.

This case is thus controlled by *Associated General Contractors*. Shortly after this Court granted certiorari in that case, the respondent City of Jacksonville repealed its challenged Minority Business Enterprise ordinance and replaced it with a new ordinance that "differ[ed] from the repealed ordinance" in several key respects. 113 S. Ct. at 2300. The Court nonetheless rejected the City's claim that the repeal rendered the case moot. Applying "the 'well settled' rule that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice,'" the Court stated that "[t]here is no mere risk that Jacksonville will repeat its allegedly wrongful conduct; it has already done so." *Id.* at 2301 (quoting *Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982)). Focusing on the "gravamen of petitioner's complaint" — namely, "that its members are disadvantaged in their efforts to obtain city contracts" — the Court reasoned that, while "the new ordinance may disadvantage [petitioner's members] to a lesser degree than the old one, . . . it disadvantages them in the same fundamental way." *Id.*

[8] *See also, e.g., Hall v. Beals*, 396 U.S. 45, 48 (1969) (*per curiam*) (case mooted by statutory amendment granting appellants the specific voting right they sought to vindicate); *United States v. Alaska S.S. Co.*, 253 U.S. 113, 115 (1920) (case mooted by new statute that achieved "[t]he thing sought to be accomplished by the prosecution of this suit"); *Berry v. Davis*, 242 U.S. 468, 470 (1917) (case mooted by new statute that eliminated "[a]ll possibility or threat" of the conduct sought to be enjoined).

The Court's analysis applies with added force to this case. Whereas the new ordinance in *Associated General Contractors* disadvantaged petitioner to "a lesser degree" than the old one, the new law here restricts to precisely the *same* degree respondents' ability to provide video programming over their own common-carrier networks — it absolutely forecloses them from doing so for at least six months.

This is therefore a live case, not one that depends on an exception to mootness. This is not merely "a case that is '*capable* of repetition, yet evading review.'" *Diffenderfer v. Central Baptist Church*, 404 U.S. 412, 414 (1972) (emphasis added) (quoting *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911)). The challenged conduct has *already been* repeated — more accurately, has been continued — in the 1996 Act. And, if the Solicitor General's argument prevails, the issue *will* evade review. Nor is this merely "the kind of case that *may* produce irreparable injury if not decided immediately." *Diffenderfer*, 404 U.S. at 414 (emphasis added). It *will* produce irreparable injury — by depriving respondents and other telephone companies of their First Amendment right to use their property for expressive purposes. *Cf. Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

The cost in terms of wasted judicial effort would also be great, in view of the timing of the supposedly mooting event. The legislation was not enacted until nearly eight months after this Court granted certiorari and two months after the Court heard oral argument. When repeal occurs after a case has been briefed and argued, and when this Court has already deliberated regarding its outcome, there is no question that the case has satisfied the functional elements of Article III — a plaintiff with "an actual injury redressable by the court," who can assure vigorous representation in "a concrete factual context." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (internal quotation marks omitted). Whether the opinion is handed down before or after a change in statutory law hinges primarily on the speed with

which the opinion is drafted and printed. It would be an odd rule that made this factor the decisive one for purposes of mootness.

In *Honig v. Doe*, 484 U.S. 305 (1988), where the Court rejected a suggestion of mootness, the Chief Justice proposed "an additional exception to our present mootness doctrine for those cases where the events which render the case moot have supervened since our grant of certiorari or noting of probable jurisdiction." *Id.* at 331-32 (Rehnquist, C.J., concurring). In his view, the Court's "unique resources — the time spent preparing to decide the case by reading briefs, hearing oral argument, and conferring — are squandered in every case in which it becomes apparent after the decisional process is underway that we may not reach the question presented." *Id.* at 332.

Since this case is not moot under the Court's "present mootness doctrine," there is no need here to consider adopting this view as a new exception to that doctrine. But the Chief Justice's concerns are greatly magnified in a case like this one, where the allegedly mooting event does not occur until months after oral argument. At a minimum, the Court should dismiss a case for mootness at this stage only where it is clear that nothing at all is left of the controversy. Here, the *very core* of the dispute, as framed at the inception of the case, remains both unchanged and vital.

3. If this Court nevertheless concludes that the appropriate response to the 1996 Act is to dismiss the petitions for certiorari on mootness grounds, it should not vacate the judgment of the Court of Appeals.

In applying the *Munsingwear* doctrine, this Court has indicated that the "pivotal[]" question, *Anderson v. Green*, 115 S. Ct. 1059, 1060 (1995) (*per curiam*), is whether this Court's review is "prevented through happenstance," *United States v. Munsingwear*, 340 U.S. 36, 40 (1950), or instead through the "voluntary action" of one of the litigants. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386, 391 (1994). Here, if this Court's review is prevented at all, it is prevented not by "happenstance" but by the voluntary decision of one of the parties — the United States of America — to alter § 533(b) after 16 federal judges had unanimously held it unconstitutional. "[C]hanges of legislative rules often seem to provide special

examples of voluntary discontinuance — public officials have surrendered a challenged position." 13A Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE & PROCEDURE § 3533.6, at 334 (2d ed. 1984 and 1995 Supp).

Moreover, vacatur is an "extraordinary remedy" to which a party must demonstrate an "equitable entitlement." *Bonner Mall*, 115 S. Ct. at 392. Any decision regarding vacatur "must also take account of the public interest," for "'[j]udicial precedents are presumptively correct and valuable to the legal community as a whole.'" *Id.* (quoting *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp.*, 114 S. Ct. 425, 428 (1993) (Stevens, J., dissenting)). Neither the public interest nor the private equities favor vacatur in this case.

If this Court were to dismiss this case but leave the Court of Appeals' judgment unaffected, respondents would at least have the continuing protection of an injunction that, in our view, should extend no less to the new Act than to § 533(b). Respondents would also be free to request an appropriate clarifying order under Rule 60(b) of the Federal Rules of Civil Procedure. If the Solicitor General has his way, however, respondents will be stripped of that protection, and the United States may once again enforce a ban on respondents' provision of video programming to subscribers in their service areas. That result would unjustifiably deprive respondents of their hard-won rights; it also would deprive the public of a presumptively correct Court of Appeals decision whose "persuasive force as precedent . . . may save other judges and litigants time in future cases." *In re Memorial Hospital*, 862 F.2d 1299, 1302 (7th Cir. 1988) (Easterbrook, J.).

CONCLUSION

This Court should reject the suggestion of mootness and should deny the request to dismiss this case. If the Court orders dismissal, it should not vacate the judgment of the Court of Appeals.

Respectfully submitted.

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